

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.736 OF 2007
IN
NOTICE OF MOTION NO.2598 OF 2007
IN
L.C.SUIT NO.2576 OF 2007**

1. The Association of Villagers
of Village Gavanpada
2. Mahendra Damodar Vaity
3. Vijay Ramchandra Vaity
4. Ratnakar Bhiwa Vaity
5. Naresh Kesarinath Vaity
6. Kishore Waman Vaity
7. Laxman Bhaskar Vaity
8. Pandharinath Vishnu Vaity.. Appellants
(Orig.Plaintiffs)

Versus

1. Mukund Iron and Staff Co-op.
Housing Society Ltd.
2. Municipal Corporation of
Greater Mumbai
3. The Assistant Commissioner 'T' Ward
4. Mr.Arun Raghunath Patel .. Respondents
(Orig. Defendants)

Mr.Deepak Chitnis i/b. Shri Deepak Chitnis Chiparikar &
Co. for the Appellants
Shri S.M.Oak for the Respondent No.1
Smt. Geeta Joglekar for the Respondent Nos.2 and 3.

**CORAM : S.R.SATHE, J.
DATED : 26/10/2007**

ORAL ORDER :-

1. Heard learned Advocates for the parties at
length.

2. Appeal is heard finally at admission stage.

3. The Appellants, Association of Villagers of Village Gavanpada, original Plaintiffs in L.C. Suit No.2576 of 2007 have preferred this appeal against the order passed by the Judge, City Civil Court, Bombay in Notice of Motion No.2598 of 2007 whereby the Plaintiff's application seeking stay to the execution, implementation of the order passed by the Asstt. Commissioner 'T' Ward, Bombay Municipal Corporation dated 22/02/2007 and restraining defendant Nos.1 to 4 from preventing Plaintiffs and their members, beneficiaries, trustees and others from using the right of access passing through the properties bearing Survey Nos.52,53,54,55,56 situated at village Mulund, Taluka Kurla, Mumbai and preventing defendant Nos.1 to 4 from constructing compound wall blocking Plaintiff's right of way to the disposal of the suit was dismissed. For the sake of convenience hereafter the parties shall be referred to as 'Plaintiffs' and 'Defendants'.

4. The brief facts giving rise to this appeal are as under :-

The Plaintiff No.1 a public trust under the provisions of Bombay Public Trust Act, 1950 and Plaintiff Nos.2 to 8 are the trustees of the said Trust. The defendant No.1 is a co-operative Housing Society. The defendant No.2 is Municipal Corporation of Greater Mumbai (hereinafter called as 'MCGM'). The defendant No.3 is the Assistant Commissioner of MCGM and defendant No.4 is the original owner of the survey numbers mentioned above. According to Plaintiffs, there were various village paths in their village Gavanpada. Accordingly, such path was in existence through above mentioned Survey numbers since last 50-60 years and all the villagers including members and beneficiaries of Plaintiff No.1 Trust were using the said path continuously, openly and uninterruptedly for at least 50-60 years and as such they had acquired the right of easement by prescription in respect of the said path.

5. The defendant No.4 and his family members sold the above mentioned survey numbers to defendant No.1 Co-operative Housing Society. The defendant No.1 Society got the construction plan sanctioned from MCGM on 21/05/1982. Taking note of the fact that Plaintiffs

were in possession of certain properties out of the said survey numbers, the defendant No.1 was directed to maintain open spaces/distances between the boundary of the plot occupied by the Plaintiffs and the defendant's property. The defendant No.1 constructed building in the survey numbers purchased by them. They constructed compound wall but they had never constructed a wall at the entrance of the village paths which were passing through the above mentioned Survey numbers. However, on 12/07/2005 or thereabout the defendant No.1 Society applied to the Asstt. Engineer Building 'D' Ward for grant of permission to repair compound wall of the society. However, while doing so, the defendant No.1 Society constructed a wall blocking entrance and exit points of the village path passing through the above mentioned survey Numbers.

6. The defendant No.1 filed Criminal Writ Petition No.4921 of 2006 in the High Court of Bombay and after hearing the Petitioners in the said Petition i.e. present defendant No.1 Society and the MCGM the Court directed that the defendant No.1 may carry out the construction of compound wall and also directed that

for that purpose, if police aid as required by the defendant No.1, it be provided. When Plaintiffs came to know about the said order, they filed Criminal Application No.96 of 2006 and prayed for modification. Accordingly, the Division Bench directed defendant No.3 to hear the Plaintiffs and after considering the material placed by the Plaintiffs and defendant No.1, find out whether Plaintiffs are having a right of access as alleged and if such access is found then defendant No.1 Society should erect a gate at the entrance and exit point and maintain the same till the dispute is resolved by the City Civil Court.

7. The defendant No.3 in pursuance of the order passed by the High Court heard Plaintiff and defendant No.1 and came to the conclusion that Plaintiffs have not proved that they are having right of access as alleged. Plaintiffs, therefore, filed the present suit and prayed for declaration that the order passed by the Asstt. Commissioner 'T' Ward on 22/02/2007 is bad in law and for permanent injunction restraining defendant No.1 from constructing a wall and thereby blocking Plaintiff's right of way through the said survey

numbers.

8. Plaintiffs also filed Notice of Motion No.2598 of 2007 and prayed for temporary injunction restraining defendant No.1 from constructing the wall and blocking the village path passing through the above mentioned survey numbers. They also prayed that the order passed by the Asstt. Commissioner on 22/02/2007 be stayed till the disposal of the suit.

9. The defendant No.1 filed the affidavit in reply and opposed the application. They denied that Plaintiffs are having any such right as alleged by them and contended that High Court had permitted them in Criminal Writ Petition No. 4921 of 2006 to carry out the construction as per the sanctioned plan and the defendant No.1 Asstt. Commissioner after hearing the case of Plaintiffs and defendant has passed order dated 22/02/2007 holding that no such right as alleged by the Plaintiff is proved by them, and hence Plaintiff's Notice of Motion be dismissed.

10. After hearing arguments of both the sides and

considering the material on record the learned Trial Judge came to the conclusion that High Court had specifically directed Asstt. Commissioner 'T' Ward to find out whether there is any proof to show that Plaintiffs are having right of access through defendant's lands and after hearing both the parties the Asstt. Commissioner has passed the order. So, Plaintiff has not made out any prima facie case. He, therefore, rejected the Notice of Motion.

11. Being aggrieved by the above order Plaintiffs have filed the present appeal. In this appeal before me, Shri Chitnis, learned Advocate for the Plaintiffs has urged 3 points. Firstly, he submitted that Asstt. Commissioner 'T' Ward can not be said to be competent authority to decide the Civil Rights of the Plaintiffs. So, the order passed by the Asstt. Commissioner 'T' Ward in that behalf is bad in law. Secondly, he canvassed before me that there is abundant material on record in the form of letters submitted by various institutions in the village wherein it is categorically mentioned that village path was in existence through the land in question and the same was being used by the

Plaintiffs and other villagers for going to school, play ground, creeks and fields etc. and if defendant No.1 is allowed to construct a wall and block entrance and exit point of the said village path, irreparable loss will be caused to the villagers at large and so balance of convenience is certainly in favour of Plaintiffs. The learned Trial Judge ought to have considered that important issue with regard to Plaintiffs alleged easementary rights has to be decided in the present suit and till then it is necessary to restrain the defendant No.1 from blocking suit path. The learned Advocate therefore submitted that the order passed by the learned Trial Judge be set aside and temporary injunction as prayed be granted. As against this, Shri S.M. Oka, learned Advocate for the defendant No.1 supported the order passed by the learned Trial Judge and submitted that Plaintiffs have not shown that village path was in existence and that Plaintiffs or other villagers have acquired any easementary rights as alleged. According to him, MCGM has sanctioned the plan for construction and defendant No.1 has carried out construction as per the said plan and as such Plaintiff has failed to make out any prima facie case and the

balance of convenience is also not in their favour. He, therefore, submitted that appeal be dismissed.

12. It is not in dispute that suit survey Numbers were initially owned by the defendant No.4 and his relatives and they have sold the same to defendant No.1 co-operative housing society. It is also an admitted fact that the defendant No.1 society then subdivided the said survey numbers in various plots and obtained necessary permission for construction of the buildings over the said plots. So far as other constructions carried out by the defendant No.1 over the suit land are concerned Plaintiffs have no grievance. The main question is whether Plaintiffs have prima facie shown that the village path as alleged by them was in existence through the land purchased by the defendants and if so whether Plaintiffs and other villagers were using the said path for several years uninterruptedly, openly, continuously for statutory period and thus, they acquired a right of easement by prescription in respect of the said path.

13. It is needless to say that grievance between

the parties or rather the issue with regard to easementary right can be decided only by the Civil Court. The Asstt. Engineer for Municipal Commissioner can not be said to be a competent authority for deciding the said issue. No doubt he can only find out as to whether the construction that has been carried by the parties, here defendant No.1, is in accordance with the sanctioned plan or not. So, merely because the Asstt. Commissioner has given a particular finding, it can not be said that it was binding on the Civil Court or that the said finding was sufficient to hold that Plaintiff has failed to make out any prima facie case.

14. The first and fore most thing which has to be mentioned is that defendant No.4, from whom the defendant No.1 has purchased property, has in fact supported the Plaintiff's case and has stated that village path as alleged was in existence and being used by the villagers. Not only that but the Plaintiff has produced letters of various educational, religious, social and other institutions of the village wherein they have stated that village path in question was in existence for several years and that was being used by

the students and villagers for going to school, fields etc. So, due weightage shall have to be given to the said statements which prima faice show that there is some substance in the allegation made by the Plaintiffs.

15. There is another important piece of evidence which prima facie goes to show that some such path was in existence through Survey Numbers which are purchased by defendant No.1. Admittedly, one map was annexed to the Conveyance Deed executed in favour of defendant No.1. In the said map we find that 9.1 meters wide access road is shown through all these survey numbers. What is more to be noted is that it is also mentioned in the said conveyance that property is sold alongwith the right to use the said access. Only thing is that it should have been mentioned in the conveyance that the villagers are having a right to use the said path. However, one thing is certain that such path was in existence for a long time and as stated above various villagers have mentioned that the said path was being used by them. Besides this, if really the said path was only meant for the occupiers of the said survey numbers

then at the time of sale of said survey numbers there was no necessity to make any special reference about the said right of access because it was part and parcel of the said survey numbers and those survey numbers were sold. So, existence of the access road shown in the map and again reference of the same in the conveyance deed prima facie show that there is some substance in Plaintiff's allegation.

16. During the course of arguments, all along it was argued on behalf of defendant No.1 that the compound wall is being constructed as per the sanctioned plan. So, an independent architect namely Nadkarni and Company (whose name was suggested by the learned Advocate for the Respondent No.1 and for which no objection was given by the learned Advocate for the Appellant) was appointed as Court Commissioner to find out as to whether the compound wall is already constructed and if so whether it is in accordance with the sanctioned plan. The Court Commissioner submitted that the sanctioned plan was only in respect of the proposed structure and not for compound wall. The Commissioner also reported that the portion of the

compound wall presently in dispute is along the western boundary of the internal access where it turns towards Plot No.4 (CTS No.207 and 208). Not only that but he has also mentioned that the portion of the wall in dispute is found demolished. So, it in a way suggests that at present the road is not blocked through that particular demolished portion. What is more to be noted is that Commissioner has reported that place where the society intends to construct the compound wall does not form any of the boundaries of plot No.4 to which the aforesaid sanctioned plans i.e. No.CE/2554/BPES/80 is related. But at the same time, the Commissioner has reported that the portion of the compound wall which is presently in dispute is along the boundary of the Society's property other than plot No.4. So, having regard to the fact that the defendant No.1 is in fact not constructing the disputed wall as per the sanctioned plan, reliance on which was placed by the defendant No.1, it has to be said that Plaintiff has made out a prima facie case for granting temporary injunction. Even if we assume for the sake of argument that the Plaintiff has not made out a prima facie case, but still, considering the point that balance of

convenience is certainly in their favour and triable issues are involved in the matter and irreparable loss and inconvenience is likely to be caused to the public at large, if the Plaintiff No.1 is allowed to put a wall at entrance and exit of the access road mentioned above, it is necessary to grant temporary injunction as prayed. So, considering all these aspects I think that order passed by the learned Trial Judge is not legal and correct. Without considering the material on record independently he has merely relied on the order passed by the Asstt. Engineer 'T' Ward. Hence, I pass the following order :-

O R D E R

1. The Appeal is allowed. The order passed by the learned Trial Judge is set aside.
2. The defendant No.1 is restrained from acting upon the order dated 22/02/2007 passed by the Asstt. Commissioner 'T' Ward and construct a wall at the entrance and exit point of the access road shown in the map annexed to their conveyance, till the disposal of the suit. The defendant No.1 is restrained from

obstructing Plaintiffs and other villagers from using the said access road till the disposal of the suit. If defendant No.1 Society finds it necessary, they may erect gate at the entrance and exit point of the said access road but that should not cause any obstruction in the use of access road by the Plaintiffs and others till the disposal of the suit.

3. The trial court is directed to dispose of the suit on merits according to law as expeditiously as possible and in any event within six months from today.

4. The Trial Court shall not get influenced by the observations made in this order and decide the suit independently on the basis of the evidence adduced at the time of Trial.

5. Both the parties are directed to appear before the trial Court on 12/11/2007.

6. The parties to act on authenticated copy of this order.

(S.R.SATHE, J.)